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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 356

GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE STEEL COMPANY and OWENS-ILLINOIS GLASS COMPANY,

Petitioners,

v.

MISSISSIPPI RIVER FUEL CORPORATION, ILLINOIS COMMERCE COMMISSION, and INTERSTATE NATURAL GAS COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Fifth Circuit, entered on July 15, 1950, in the case there entitled *"Interstate Natural Gas Company* v. *Federal Power Commission, et al."*, No. 10701 on the docket of said court.

OPINION BELOW

The opinion of the Court of Appeals (R. 131) is reported in 181 F. 2d 833.

JURISDICTION

The judgment and decree of the Court of Appeals was entered on July 15, 1950 (R. 141). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

Did the Court of Appeals obey the mandate of this Court issued on the opinion in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U. S. 577, when, after making the full agreed provision for retail customers of public utility customers of respondent Mississippi River Fuel Corporation out of the impounded fund arising from reduction of Interstate's rates to Mississippi, it orderd paid to Mississippi the remaining portion of the impounded fund, which admittedly was attributable to sales by Mississippi to petitioners, direct industrial customers, although: (1) this Court ruled that Mississippi could not participate in the fund except under conditions which indisputably did not exist, (2) petitioners have had no benefit from the rate reduction and Mississippi will receive a windfall; and (3) petitioners probably could have obtained such benefit, absent the impounding order, either through contract revision or by Illinois Commision action?

STATUTES INVOLVED

The provisions of the Illinois statutes hereafter discussed are printed in Appendix A, hereto, *infra* pp. 19-20.

STATEMENT

Petitioners are all manufacturers having plants in Illinois in the Alton-East St. Louis area and purchase natural gas for consumption directly from respondent

Mississippi River Fuel Corporation, the only interstate natural gas company serving the St. Louis metropolitan area (R. 89). They were not parties to the case when it was last here.

The Federal Power Commission ordered a reduction of the rates of Interstate Natural Gas Company. Pending review, the court below stayed the reduction order and required Interstate to deposit monthly the excess of the old over the new rates in the registry of the court. The stay order was in effect from June, 1943 to October, 1947 (R. 12). After affirmance of the Commission order (156 F. (2d) 949 and 331 U. S. 682), the court below directed that the impounded funds be distributed to Interstate's direct customers, who were also interstate pipeline companies, including respondent Mississippi (166 F. (2d) 796).

This Court reversed with directions, 336 U. S. 577. Four opinions were delivered. The opinion of the Court was by Mr. Justice Douglas, in which the Chief Justice and Mr. Justice Reed joined. Mr. Justice Frankfurter wrote a concurring opinion. The opinion of Mr. Justice Jackson, concurred in by Mr. Justice Burton, stated "[we] view this case in a different light than do any of our brethren but we have joined in the judgment and the opinion of Mr. Justice Douglas because we deem it important that instructions to the court below carry a concurrence of a majority of this Court" (336 U. S. 590). The opinion of Mr. Justice Black concurred in the reversal but dissented from the instructions. It was joined in by Mr. Justice Murphy and Mr. Justice Rutledge.

After the coming down of the mandate, Mississippi submitted a plan for distribution of the portion of the impounded fund allocable to sales to it by Interstate (R.

1). The amount involved was $1,484,582.53 (R. 13). $300,898.66 was to be paid to public utility customers of Mississippi for distribution to their customers and $244,-103.70 was to be paid to Mississippi by way of reimbursement for a reduction in an equal amount which it had passed on to its public utility customers (R. 13). These payments were approved by all parties.

The remaining $939,580.17 was allocated to sales to industrial customers by Mississippi (R. 13). This amount was to be paid to Mississippi.

An order to show cause was directed against all interested parties, which for the first time brought the industrial customers into the case (R. 40). Petitioners (R. 46, 54, 62, 81) and other industrials (R. 52, 69, 78, 80, 128) sought payment out of the fund of their allocated shares. Petitioners' claims total $304,452.45. The claims of other industrial customers, petitioners in the companion case, total $163,166.34. Other industrial customers, to whom $454,-670.30 was allocated, either signed waivers solicited by Mississippi or did not respond to the order to show cause (R. 95).

The allocation of amounts to both public utility and industrial customers (including the amounts claimed by petitioners) was made by Mississippi in conjunction with Federal Power Commission (R. 131) and was not disputed by any party to the proceeding, except Illinois Commerce Commission which contended allocation should be on a revenue basis (R. 42).[1]

The Federal Power Commission, recognizing its lack of jurisdiction over sales to industrial customers, took no position as to distribution of the amount allocated to indus-

[1]The record does not show what difference this would make, but Mississippi and Federal Power Commission have stated it would be *de minimis*.

trial customers (R. 13-14).[2] The Missouri Commission recognized that it had no statutory jurisdiction over sales to industrials (R. 26). The Illinois Commission contended that no part of the fund (except the $244,103.70 already passed on) should be paid to Mississippi, that the industrials should receive their allocable shares, or if this was not done, the entire amount should be paid to domestic consumers (R. 42-43).

The Court of Appeals adopted the Mississippi plan and ordered the entire amount allocated to industrial sales paid to Mississippi (R. 141).

SPECIFICATION OF ERRORS

The Court of Appeals erred in failing to comply with the mandate of this Court issued on the opinion in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U. S. 577, in the following respects:

1. By failing to hold that respondent Mississippi was not entitled to participate in the impounded fund, since its rates were not unreasonably low and it did not pass on the benefit of the rate reduction to its customers, and that petitioners' allocated shares should be paid to them;
2. By failing to hold that the equitable principles stated by this Court required payment to petitioners of their allocated shares of the impounded fund;
3. By failing to hold that petitioners were entitled to their allocated shares of the impounded fund because of probable operation of Illinois law in the absence of the stay order.

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[2]The contrary statement in the Court of Appeals opinion, 181 F. 2d 834, note 3, R. 132, is incorrect.

REASONS FOR GRANTING THE WRIT

Petitioners submit that the writ should be granted in order to enforce compliance with the prior mandate of this Court, and because the question involved is an important one in the administration of the Natural Gas Act (15 U. S. C. 717 *et seq.*).

1. The decree of the Court of Appeals fails to carry out the mandate of this Court and should be corrected.

Except for the payment of $300,898.66 to public utility customers, consented to by Mississippi, the present order of the Court of Appeals is not different from the prior order, which was set aside here.

> "It is well understood that this court has power to do all that is necessary to give effect to its judgments" *B & O Ry. Co.* v. *United States*, 279 U. S. 781, 785.

It is submitted that the prior opinion of this Court definitely ruled that absent certain conditions which it is now indisputably established do not exist, Mississippi was to be precluded absolutely from participation in the fund, and that under the facts as now developed, the portion of the fund attributable to sales to petitioners was payable to them. Even if it should be considered that the opinion is not subject to such interpretation, application of either the equitable principles there announced or of Illinois law as there required, made it mandatory on the court below to award petitioners their allocated shares of the fund.

(a) *The plain language of the opinion precludes payment to Mississippi and requires payment to petitioners.*

This Court pointed out that Mississippi and the other pipe-line customers of Interstate were subject to regulation under the Natural Gas Act and that accordingly:

> "The claims of these pipe-line companies to the fund are therefore determinable *solely with reference to federal law,*[3] * * * We may not therefore sustain the action of the Court of Appeals unless it is clear as a matter of *federal law* that the pipe-line companies are entitled to the fund" (336 U. S. 580-1).

This Court then stated the federal law to be that the pipe-line companies might be entitled to all or part of the reductions if their rates had been unreasonably low, which would not be presumed, or if the benefit of the rate reduction had been passed on to their customers (336 U. S. 581-2).

It was then said:

> "* * * But *apart from those exceptions,* it is the duty of the court to *look beyond* those companies for the rightful claimants of the fund" (336 U. S. 582).

In the subsequent proceedings below, Mississippi made no attempt to show that its rates to any class of customers were unreasonably low. On the contrary, it was made to appear that they were high. On the basis of 1943 operations, the Federal Power Commission ordered a reduction of Mississippi's rates to utility customers, even on the basis of the high Interstate rates, and found that for that year Mississippi's revenues of $5,745,218 from industrial customers were $1,165,791 in excess of the amount necessary to earn a 6% return on that part of its business (4 F. P. C. Repts. 340, 358). From 1943 through 1947, revenues, operating expenses and net earnings of Mississippi were substantially level, except for increase in each in 1947 (R. 88).

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[3]All emphasis is ours.

Mississippi likewise made no attempt to show that the benefit of the Interstate reduction had been passed on to any of its customers, except the amount of $244,103.70 passed on to public utility customers, which is allowed for in the decree below and is not contested. Rates to industrial customers were not reduced (R. 90).

That the court below was to "look beyond" Mississippi if it could not come within either of the two exceptions is further emphasized by other parts of the opinion. The Court speaks of the argument that "the federal court could not *by-pass* the pipe-line companies without undertaking to pass on the reasonableness of the rates which they have charged * * *" (336 U. S. 582). There would have been no reason to use the term "by-pass" if payment was not to be made beyond the pipe-line companies. Further it is said: "The problem is somewhat more complicated if distribution of the fund is to be made to claimants *other* than the pipe-line companies" (336 U. S. 583). This again clearly contemplates payment beyond the pipe-line companies. It is then said that if "local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply it" (336 U. S. 583). It had already been stated that the claims of the pipe-line companies were determinable "solely with reference to federal law", so that in directing application of local law, the reference necessarily was to claimants beyond the pipe-line companies.

Applied to the facts as developed before the court below, the direction to "look beyond" Mississippi could mean only payment to the industrial customers. Mississippi had wholly failed to show that its rates were unreasonably low or that it had passed on the benefit of the reduction. All questions of allocation had been settled by agreement of

the parties.[4] The distributing companies and their customers were to receive the amounts agreed upon by those companies and the federal and state commissions.[4] The remaining issue was strictly between Mississippi and its industrial customers. If payment was not made to the industrial customers it could be only to Interstate, which was not "beyond" Mississippi, clearly had no right and had disclaimed (R. 120), or to the public utility customers, with the result of their receiving more than they were entitled to or any public body claimed for them (except for the secondary claim of the Illinois Commission).

The Court of Appeals not only ignored the direction to "look beyond" Mississippi; it applied principles which stopped just short of holding that Mississippi had an absolute right to the fund.

It said that "prima facie" the moneys belonged to Mississippi (181 F. 2d 836, R. 136) and that a "positive burden" rested on the industrials to show a right of recovery (181 F. 2d 837, note 8, R. 138).

Thus, although this Court directed that the fund should not be paid to Mississippi, the Court of Appeals put Mississippi in a position of primary right from which it could not be removed except by a clear and convincing showing. This Court having pointed out that there could be no certainty as to what would have happened in the absence of the stay order and that the matter was one of "prognostication" (336 U. S. 584), the rules laid down by the Court of Appeals made it practically impossible for it to find for anyone but Mississippi.

The alleged rule of prima facie right of Mississippi was based only on a passage from the opinion of Mr. Justice

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[4]Except insofar as it can be said that the Illinois Commission disagreed. See pages 4 and 5 *supra*.

Jackson, which opinion was expressly stated to be in disagreement with the opinion of the Court.

The Court of Appeals based its rule of "positive burden" on the following passage from this Court's opinion:

> "* * * We likewise do not know whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority" (336 U. S. 583).

The passage clearly has no bearing on any matter of "positive burden", but merits discussion for another reason.

The Court of Appeals apparently concluded that this sentence meant the industrial customers could recover only if a contract right to rate adjustment existed (the absence of such right is undisputed) or if there was certainty that relief could have been obtained under local regulatory authority. Petitioners say that they were entitled to relief by application of Illinois law (*infra* pp. 14-17), but maintain that they were so entitled regardless of Illinois law.

In giving such effect to the quoted statement, the Court of Appeals overlooked the fact that it then had been definitely established that Mississippi could not come within either of the exceptions stated by this Court and accordingly could not participate in the fund. The Court of Appeals also failed to note that the passage is in a paragraph predicated on non-participation by the pipe-line companies, the first sentence of which is: "The problem is somewhat more complicated if distribution of the fund is to be made to claimants *other* than the pipe-line companies" (336 U. S. 583). The statement thus dealt with the relative rights of industrial and other classes of customers. Complete provision having been made for distributing companies and their

customers, there was no possible controversy before the Court of Appeals between customers but only between the industrial customers and Mississippi and that controversy was controlled by previous statements of this Court.

The Court of Appeals also intimated (181 F. 2d 837, note 8, R. 137) that industrial customers were not included in the "ultimate consumers" which this Court said were entitled to the benefit of the rate reductions (336 U. S. 581). If the Court of Appeals was correct, there would have been no occasion for the subsequent discussion in this Court's opinion of possible factors affecting the rights of industrials in the fund.

It may be argued that the absence of federal regulation of direct sales to industrial customers removes them from the protection of the Act. However, in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission,* 332 U. S. 507, the Court pointed out that Federal jurisdiction over both direct industrial sales and sales to customers of local distributing companies was not asserted for the same reason in each case: the existence of state power to regulate (p. 514, 517). The purpose was to confirm and aid state control in each case as part of a comprehensive scheme (p. 520-1). Accordingly, if direct industrial sales are not entitled to the protection of the Act in a proper case, the same would be true of sales to customers of local distributors. Furthermore, service to direct customers is not outside the Act. Interstate transportation without sale for resale is subject to the Act. *Federal Power Commission* v. *East Ohio Gas Co.,* 338 U. S. 464. The construction of facilities for industrial service is subject to Federal Commission approval. *City of Detroit* v. *Panhandle Eastern Pipeline Co.,* 5 F. P. C. 43.

(b) *The equitable principles which the court below was directed to apply equally required an order in favor of petitioners.*

As already shown, petitioners believe that this Court determined finally that Mississippi was not to participate in the fund if it could not come within either of the two exceptions mentioned. Even if the opinion is not so interpreted, it is still true that application by the court below of the equitable principles stated in this Court's opinion should have resulted in payment to petitioners.

The Court stated that it was the duty of the court below

> "* * * 'to correct that which has been wrongfully done by virtue of its process.' * * * That responsibility plainly cannot be discharged by payment of the fund to those who show no loss by reason of the court's action" (336 U. S. 582).

and

> "* * * When a federal court of equity grants relief by way of injunction it has a responsibility to protect all the interests whom its injunction may affect. * * * It assumes the duty to make disposition of the fund in accordance with equitable principles * * *" (336 U. S. 582-3).

Clearly, Mississippi has suffered no loss but on the contrary has received a windfall and thus is outside the class of possible recipients specified by this Court. On the other hand, the stay order deprived the industrial customers of any right to seek lower rates on the basis of the reduction order. Their contracts terminated and were renewed or were terminable during the stay period (R. 48, 55, 63). No reduction of rates was effected. There is no certainty that they would have been successful, but as the Court pointed out, "no one can know for a certainty" what would have

happened in the absence of the stay order (336 U. S. 584). The probable result is that suggested by the Court: "Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility" (336 U. S. 581). The equities are thus clearly with petitioners.

Award of the fund to Mississippi is also inequitable because it defeats the basic purpose of the Act. The fund was created not by any effort or skill of Mississippi but by operation of a national law intended to protect consumers from pipe-line companies. If the fund so created is to be turned over as a windfall to a company regulated for such purpose, the Act is surely "an exercise in futility."

Furthermore, at the time of the impounding order, Interstate and Mississippi were affiliated, Standard Oil of New Jersey owning 53% of the voting stock of Interstate and 22% of Mississippi (See Record, pp. 250-254 in *Interstate Natural Gas Co.* v. *Federal Power Commission,* No. 733, October Term, 1946). If the effect of an impounding order is to keep within the family charges which the Power Commission has held to be too high, it is again "an exercise in futility."

The court below disposed of the equitable aspect of the case by saying that the rates had been fixed by arms length bargaining (181 F. 2d 838, R. 138). This ignores the fact that Mississippi has a monopoly in the St. Louis area and that by virtue of the certificate provisions of the Natural Gas Act (15 U. S. C. 717 f(c)), there can be no competition without Federal Power Commission permission. It also ignores the fact that the stay order deprived the industrials of any opportunity to demand lower rates on the basis of lower costs.

The Court of Appeals also suggested that if Mississippi is not to receive the fund because of absence of loss, by the same token the fund should be passed on to customers of the industrials, *ad infinitum* (181 F. 2d 838, R. 139). It is submitted that there is a clear distinction between paying the fund to a regulated monopoly company and passing that sum on to its customers who are engaged in competitive businesses. Certainly no such consideration has prevented refunds to business customers of distributing utilities.

(c) *The Court of Appeals failed to give effect to Illinois law.*

Petitioners submit that proper application of Illinois law as required by the opinion would have equally brought forth a decision in their favor.

As one means of disposition of the fund, the opinion of this Court directed the court below to ascertain whether the local law provided a standard for distribution of the fund and if it did, to apply it so as to achieve the result which would have occurred except for the impounding order (336 U. S. 583-4).

Relevant parts of the Illinois statutes appear in Appendix A hereto. These statutes define the term public utility as including any person operating any property used "for the conveyance of oil or gas by pipe line" (Sec. 10, p. 19); give the Commission power to fix just and reasonable rates and reduce rates that are unreasonable, on its own initiative or on complaint (Sec. 41, pp. 19-20); and confer jurisdiction to make reparation orders (Sec. 76, p. 20).

Panhandle Eastern Pipe Line Co. v. *Public Service* Commission, 332 U. S. 507, establishes that a state may constitutionally exercise this power as to sales to industrial customers by interstate pipe-line companies.

It thus appears that absent the stay order, petitioners would have been in a position to apply to the Illinois Commission for a reduction in rates or reparations or both, on the basis of the reduced cost to Mississippi. The existence of contracts between the parties would not have precluded this relief. *Jefferson Building Corporation* v. *Central Electric Light Co.*, 350 Ill. 237; *Midland Realty Co.* v. *Kansas City Power & Light Co.*, 300 U. S. 109.

As already shown (*supra* p. 7), the earnings of Mississippi on its industrial business during the impounding period, even on the old Interstate rates, were far in excess of a reasonable return. On these facts, the probability that the Illinois Commission would have granted reductions or reparations at least to the amount of the Interstate reduction is so strong as to have required the court below to make an award to petitioners in the amount of their allocated shares.

Petitioners' position is supported by an order of the Illinois Commission made in 1950 asserting jurisdiction over Mississippi (R. 59), and as to right of recovery, by the position of the Illinois Commission in the Court of Appeals (R. 42-43).

The Court of Appeals (181 F. 2d 838, R. 139-40) rejected petitioners' contention because of a 1949 order of the Illinois Commission determining it did not have jurisdiction over Mississippi (R. 28), apparently on the theory that since it was closer to the impounding period, it indicated what the decision would have been then.

Since it is clear that an order of an administrative body as to status is legislative in character and involves no *res judicata* (*People* v. *Biggs*, 402 Ill. 401; *State Commision* v. *Wichita Gas Co.*, 290 U. S. 561), the Court of Appeals was

not entitled to regard the 1949 order as evidencing either the probable holding of the Illinois Commission in 1943 to 1947 or the correct rule, particularly when the 1950 order and the position of the Commission in this case are to the contrary.

Regardless of the conflict, the duty of the Court of Appeals was to decide the question. The decision should not have been a difficult one in view of the clear statutory provisions.

The court below also said it could not find that "clear and speedy state remedies are available" (181 F. 2d 839, R. 140). This is correct, but not for the reason stated. The only possible proceeding before the Illinois Commission at this late date would have been one for reparations, but the statute (Appendix A, Sec. 76, p. 20) contains a one year limitation. However, the absence of a present state remedy did not mean that the court below should turn the money over to Mississippi. The direction of this Court was that the court below decide for itself (336 U. S. 584).

By holding that Mississippi was prima facie entitled to the fund and that a positive burden rested on the industrial customers, the Court of Appeals effectively undid what had been accomplished by the reversal of its prior order.

It ignored the direction that it should "look beyond" Mississippi. It nullified the direction to do equity by starting with a strong presumption in favor of Mississippi and requiring the industrials to overcome a positive burden. By adopting those standards, it made meaningless the direction of this Court to apply as best it could information from available sources, including local law and regulatory authorities.

This Court recognized that "no one can know for a certainty" (336 U. S. 584) what would have happened in the absence of the stay order. In spite of this, the Court of Appeals by placing a "positive burden" on the industrials to establish their rights, required an exactitude of proof not contemplated by this Court and concededly impossible of attainment.

The net result was the same as under its prior order except on matters as to which Mississippi yielded.

It is respectfully submitted that this is an outstanding example of the need of action by this Court to insure obedience to its mandate.

2. The question involved is an important one in the administration of the Natural Gas Act.

It is respectfully submitted that it is of prime importance that the question here involved should be settled and the rights of industrial customers of natural gas companies in impounded funds clearly defined. The operations of natural gas companies are constantly expanding and industrial use is increasing. Interconnections between primary pipe lines and secondary sellers are becoming more numerous. It can be anticipated that rate cases under the Natural Gas Act will continue for many years in the future. Such cases involve large sums of money and many parties. It is of great public importance that the rights of the companies and their customers be clarified by a definitive pronouncement of this Court.

By granting the writ in the prior instance, this Court recognized the importance of settlement of these problems. The Court of Appeals' decision is so at variance with the

opinion of this Court that the questions will be even more unsettled and confused than before if the Court of Appeals' decision is not reviewed and corrected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A

Chapter 111 2/3 Smith-Hurd Illinois Statutes

Sec. 8:

"The Commission shall have general supervision of all public utilities, except as otherwise provided in this Act, shall inquire into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine such public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the provisions of this Act and any other law, with the orders of the Commission and with the charter and franchise requirements."

Sec. 10:

"The term 'public utility,' when used in this Act, means and includes every corporation, company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever * * * that now or hereafter:

"(a) May own, control, operate, or manage, within the State, directly or indirectly, for public use, any plant, equipment or property used or to be used * * * for the conveyance of oil or gas by pipe line; * * *"

Sec. 41:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates

or other charges, or classifications, or any of them, demanded, observed, charged or collected by any public utility for any service or product or commodity, or in connection therewith, * * * are unjust, unreasonable, discriminatory or preferential, or in any wise in violation of any provisions of law, or that such rates or other charges or classifications are insufficient, the Commission shall determine the just, reasonable or sufficient rates or other charges, classifications, rules, regulations, contracts or practices to be thereafter observed and in force, and shall fix the same by order as hereinafter provided.

"The Commission shall have power, upon a hearing, had upon its own motion or upon complaint, to investigate a single rate or other charge, classification, rule, regulation, contract or practice, or any number thereof, or the entire schedule or schedules of rates or other charges, classifications, rules, regulations, contracts and practices, or any thereof of any public utility, and to establish new rates or other charges, classifications, rules, regulations, contracts or practices or schedule or schedules, in lieu thereof. * * *"

Sec. 76:

"When complaint has been made to the Commission concerning any rate or other charge of any public utility and the Commission has found, after a hearing, that the public utility has charged an excessive or unjustly discriminatory amount for its product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest at the legal rate from the date of payment of such excessive or unjustly discriminatory amount.

* * * * * *

"All complaints for the recovery of damages shall be filed with the Commission within three years from the time the produce, commodity or service as to which complaint is made was furnished or performed, * * *"

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

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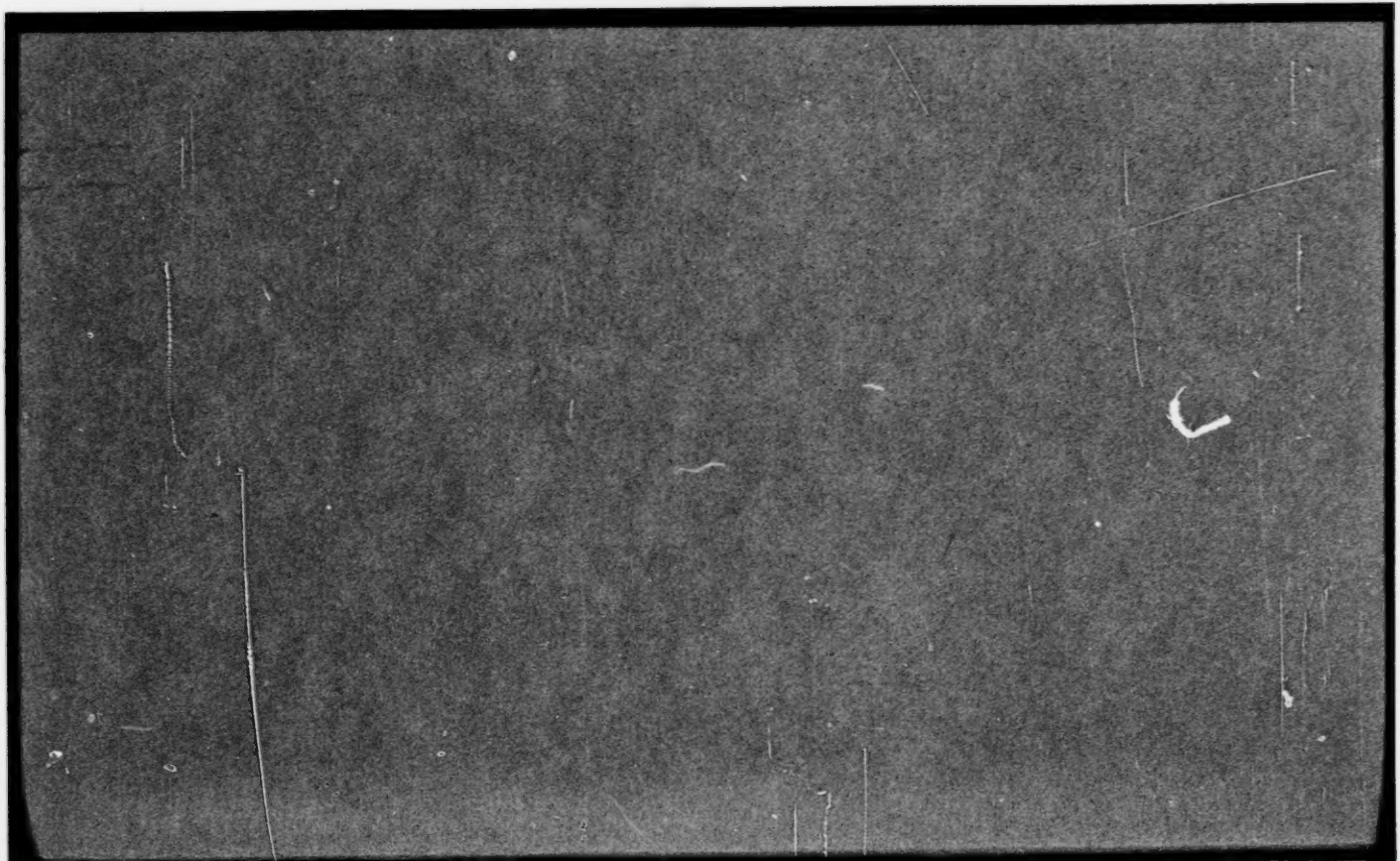

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 356.

GENERAL STEEL CASTINGS CORPORATION, GRANITE CITY STEEL COMPANY, LACLEDE STEEL COMPANY and OWENS-ILLINOIS GLASS COMPANY,

Petitioners,

vs.

MISSISSIPPI RIVER FUEL CORPORATION, ILLINOIS COMMERCE COMMISSION and INTERSTATE NATURAL GAS COMPANY, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR RESPONDENT, MISSISSIPPI RIVER FUEL CORPORATION, IN OPPOSITION.

Opinion Below.

The Opinion of the United States Court of Appeals for the Fifth Circuit (R. 131) is reported at 181 F. 2d 833.

Jurisdiction.

The Opinion and Judgment of the Court of Appeals was filed May 9, 1950 (R. 131). The formal Decree adopted in said Judgment was entered July 15, 1950 (R. 141). Petitioners seek to invoke this Court's jurisdiction under 28 U. S. C., Section 1254(1).

Question Presented.

Where a natural-gas company sells gas for resale and also for consumption, may it be awarded overcharges paid by it to a supplying natural-gas company when the amount of such overcharges concededly relates to natural gas purchased for direct sale for industrial consumptive use if no local law or regulatory process inhibits such distribution and the privately negotiated arms length contract of sale to the industrial consumer does not provide for a reduction in price?

Statute Involved.

Section 1(b) of the Natural Gas Act (52 Stat. 821, (1938), 15 U. S. C., §717(b)):

> "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Statement.

Mississippi River Fuel Corporation ("Mississippi"), the Respondent herein, sells gas for two purposes: (1) to industrial companies such as petitioners for direct consumption by them, and (2) to public utility distribution companies for resale. Mississippi proposed to the court below a plan of distribution whereby all of the excess charges paid by it to Interstate Natural Gas Company,

Incorporated ("Interstate") for gas which was sold for resale would be paid to the public utility distribution companies for distribution to ultimate consumers or otherwise as proper state commissions might direct (R. 11-20, 143).

As to the amount of excess charges paid by Mississippi for gas sold directly by it to industrial consumers, Mississippi made claim in the Court below for the entire amount. This was done on the basis that all direct industrial consumers of gas purchasing from Mississippi were located either in the State of Missouri or the State of Illinois. The Public Service Commission of Missouri had found on December 22, 1948 that it did not possess statutory regulatory authority over the sales of natural gas by Mississippi for consumption (*In the Matter and Jurisdiction to Regulate Direct Sales of Natural Gas for Industrial Uses by Mississippi River Fuel Corporation,* Case No. 11,255, Mo. Pub. Serv. Comm., Dec. 22, 1948) (R. 26-27). The Illinois Commerce Commission had found on January 14, 1949 that it did not possess statutory regulatory authority over such sales (*Illinois Commerce Commission* v. *Mississippi River Fuel Corporation,* 77 PUR NS 12 (Ill. Com. Comn., 1949)) (R. 28-35). A subsequent citation against Mississippi to show cause why its sales for direct consumption should not be regulated by that Commission has not yet been heard (R. 59-62). Another basis, confirmed by a finding of the Court below after admission to that effect by all parties, was that there were no contractual provisions in the gas sales contracts between Mississippi and direct consumers of its gas relating to any refund or adjustment of price on account of a decrease in the cost of the commodity (R. 131-134).

The facts as otherwise set forth in the petition are substantially correct except that petitioners attribute to the Court below an incorrect statement which the Court in fact

did not make (petition, pp. 4-5, fn. 2). While the Federal Power Commission in the stipulation (R. 13-14) did not take any position as to the distribution of amounts representing volumes of gas sold for direct consumption, in the memorandum brief of the Federal Power Commission (R. 95-96, 99-102) the position of that body was stated and fully justified the Court's comment which petitioners claim to be incorrect.

While the Court below adopted Mississippi's suggested decree, the Court conducted a hearing and had this matter fully argued before it and after weighing the equities and reconstructing the situation which would have pertained had no Stay Order been granted, decided that Mississippi was entitled to the funds representing excess charges paid for gas purchased by it and sold directly for consumption for industrial purposes only. There is not involved here one dollar of amounts paid in excess charges for gas sold by Mississippi to utility distribution companies for resale to domestic and other consumers. Therefore there is no question here of refunds not having been made in full compliance with the rate regulatory jurisdiction of the Federal Power Commission (Natural Gas Act, §1(b), 15 U. S. C. §717(b)) or any other Federal law.

Petitioners claims represent a total of $304,452.45 out of the total of $939,580.17 of excess charges paid by Mississippi for gas sold directly to industrial consumers. The four petitioners in this docket along with the five petitioners in the petition in No. 357 represent the total of only nine direct industrial customers of Mississippi who claim a right in the impounded funds and their total claims amount to $467,618.79 (petition, p. 4). Mississippi sells gas to fifty-five direct industrial customers, of whom twenty-two recognized that they had no claim; seventeen did not appear in the Court below to show cause; and two now have appar-

ently abandoned any previously asserted claim (R. 135-136). Therefore, the vast majority of Mississippi's direct industrial purchasers of gas for consumption have recognized the fairness of the payment to Mississippi. The remaining claimants clearly are seeking a windfall for themselves.

Argument.

The common complaint of the petitioners in this case and in the petitions for certiorari in Nos. 357 and 360 of October Term, 1950 is that the Court below did not obey the prior mandate of this Court (in *Federal Power Commission* v. *Interstate Natural Gas Company,* 336 U. S. 577), and that the questions presented are of importance in the administration of the Natural Gas Act.

Petitioners are wrong on both counts. Their complete misinterpretation of this Court's opinion and the order of the Court of Appeals is due to a lack of understanding of the legal status of Mississippi as a seller of natural gas to industrial customers for consumption. Sales of gas to petitioners by Mississippi are not made under Federal law but under State law (*Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana,* 332 U. S. 507). The rights and obligations existing between Mississippi and petitioners are found in the local law of Illinois and not in the Natural Gas Act. Mississippi, in fact, occupies a dual status in its sales of gas. It is a natural-gas company subject to Federal law in respect of its sales to utility distributing companies for resale. It is a seller of gas under state law in respect of its sales to petitioners for consumption.

Once this dual status of Mississippi is understood the legal and equitable principles which the Court of Appeals followed clearly are in accordance with the mandate of this

Court. Those matters to be determined solely with reference to Federal law concern only the sales made by Mississippi for resale. All questions effecting the claims of petitioners must be decided by the local law and those are the only questions involved in this petition.

I.

The decision below is clearly correct and in accordance with the directions of this Court.

Petitioners start off with the contention that the present Order of the Court below is not different from the prior Order which this Court reviewed and set aside. This contention is palpably false. The essence of the previous review and reversal was that the Court below could not summarily award the total amount of impounded funds to the immediate purchasers of Interstate since such purchasers were natural-gas companies and the Court had the duty to look into the relative equities of the parties in the fund involved. This Court did not say that Mississippi could not share in the refund as petitioners claim. Rather the Court below was enjoined to investigate the equities and the local state law to determine to whom payment should be made.[1]

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[1] "The problem is somewhat more complicated if distribution of the fund is to be made to claimants other than the pipe-line companies. The latter sell gas to at least two types of customers—industrial users over whose rates the Federal Power Commission has no jurisdiction and over which state regulatory bodies may or may not, depending on local law; and numerous distributing companies selling to customers in eight states. If the pipe-line companies had passed the rate reductions on to the distributing companies, those reductions may or may not have reached the ultimate consumers. We likewise do not know whether the reductions would have reached the industrial users either by terms of the contracts or by virtue of the assertion of regulatory authority.

"If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the federal court should apply it" (336 U. S. at 583).

This is exactly what the Court has done in the matter which petitioners now seek to bring here for further review. The Opinion of the Court below (R. 131 *et seq.*) is devoted almost in its entirety to a weighing of all of the facts and circumstances surrounding the relative equities of the parties. Because of the plan submitted by Mississippi with the concurrence of the Federal Power Commission (R. 11, 13-14) and the concessions made by Mississippi in awarding all excess amounts paid for gas which was sold by Mississippi for resale (R. 11-20, 143), and the cooperation of two of the three state commissions involved (R. 20-24), the Court had removed from its consideration all questions relating to sales of gas by Mississippi for resale. By the same token there was removed from consideration of the Court all questions involving the policy of the Natural Gas Act since such policy is concerned only with sales of gas for resale. This Court's previous opinion in this general refund matter put the matter on its functional basis when it stated:

> "The rates charged a wholesaler are part of its costs, reflected in its rate base. Reduction of those costs normally will lead in due course to reduction in its resale rates, unless we are to assume that the passage of the Natural Gas Act was an exercise in futility" (336 U. S. at 582).

Therefore, the Court was speaking of, *inter alia,* Mississippi in its function as a wholesaler or as the seller of natural gas for resale. The policy of the Natural Gas Act has been executed in this proceeding, a fact of which the Court below was aware even though petitioners do not seem to comprehend it. Consequently, the burden of the Court below was considerably lightened, but that does not mean that it did not forge ahead and weigh every pertinent fact and principle applicable to a possible distribution of any part of the fund to Mississippi's retail consumers.

Petitioners can strain their rationale to fit some superficial semblance of claim to being wronged by the decision below only by identifying themselves with the wholesale function of Mississippi under Federal law. In effect, they are willing to become utility distribution companies for the immediate purposes of their petition, but one cannot overlook the opening sentence of petitioners' statement (petition, p. 2) wherein it is stated that they are all manufacturers and "purchase natural gas for consumption directly from respondent Mississippi River Fuel Corporation". Having thus found a new status for themselves since making this opening sentence to their Statement, they now identify themselves with all which this Court has stated before in relation to the rights of either Mississippi's utility purchasers for resale or their ultimate consumers. From this point petitioners find it easy to assert that Mississippi in 1943 exacted unreasonable rates from them and, therefore, that Mississippi is in no position to show that its rates were unreasonably low during the impoundment period.[2] This Court in requiring as a condition to obtaining any portion of an impounded fund, a showing by an intermediate natural gas company that its rates were unreasonably low referred only to the wholesale or sales for resale function which is the subject of Federal law. No matter how appealing the language previously used by this Court may be to petition-

[2] True, the Federal Power Commission in 1945 entered a rate reduction order against Mississippi effective January 20, 1946. In said rate reduction order the year 1943 was used as a test year so far as sales volumes and gross revenues alone were concerned. The Power Commission, however, adjusted actual expenses downward and used future expectations in business. The result so far as 1943 is concerned is nothing but an adaptation of an actual year's operations to an anticipated future year after elimination of nonrecurring expense items etc. The Power Commission did not make any conclusions as to the actual 1943 rate situation and its conclusions as to the return of Mississippi were expressly stated to be related only to "regulated sales to the utility customers" (4 F. P. C. 340, 346-351, 360).

ers, the fact remains that it was not said of sales to them, but rather only of sales to the utility distribution companies to which Mississippi sold gas for resale.

We submit to the Court that the direct industrial user, petitioners, cannot identify themselves with ultimate consumers of gas sold by Mississippi for resale by the mere verbiage of their petition.

Petitioners assert that the Court below not only ignored this Court's direction to look beyond Mississippi, but it applied principles just short of holding that Mississippi had an absolute right to the fund and also that "prima facie" the monies belonged to Mississippi. In the first place, the Court of Appeals did look beyond Mississippi but saw nothing there. All it could see was the Order of the Illinois Commerce Commission holding that it had no jurisdiction over the direct sales of Mississippi for consumption (R. 28-36, 139-140) and a similar Order of the Public Service Commission of Missouri (R. 26-28, 139). Also, looking in the direction of the contracts, it could not find in the same any provision indicating a right to a refund from Mississippi to these direct users of gas in the event the commodity was made available to Mississippi at a lower price. In fact the lack of contractual provision in this regard was admitted (R. 133-134). In this regard the Court below said:

> "Valid when made, and remaining valid and binding throughout, unaffected by the Federal rate proceedings and the rate order made by a commission, neither asserting nor having jurisdiction over prices paid or to be paid by them under the contract, they were the fruit of private and arms length negotiations under the compelling pressures of other competing fuels" (R. 138).

Having thus looked for a contractual provision and for a state regulatory process applicable to the situation and find-

ing neither, the Court went on to determine the equities as they stood in view of this lack of applicable state law or contractual provision.

It was in pursuance of this design that the Court noted the fact that the industrial claimants were in no better position from an equitable standpoint because the prices charged, it found, are fixed on a competitive open market basis and there was no ground for finding that Mississippi was unjustly enriched. As the Court below stated:

> "This is so because Mississippi collected from them only what, dealing at arms-length and in a market where prices are fixed by costs of competing fuels, they had voluntarily agreed to pay" (R. 138-139).

The Court below also pointed out that no theory of unjust enrichment can be applicable upon the prayer of these petitioners because by returning to the petitioners a part of the contract consideration the petitioners in turn would be unjustly enriched and so on *ad infinitum* (R. 138-139).

Even if the Court did conclude that, prima facie, the money belonged to Mississippi, the case still proceeded on the basis of a showing by Mississippi that it was entitled to the funds in dispute. Mississippi asserted in its pleading in the Court below that the States of Illinois and Missouri had definitively determined that their regulatory agencies do not have jurisdiction over the sales by Mississippi for consumption. There was no countervailing contention made in respect of the State of Missouri and the State of Illinois was permitted to show, and the Court recognized, that it had recently issued a Citation which would again inquire into Mississippi's status in Illinois (R. 139). Mississippi asserted the lack of any contractual provision entitling the petitioners to a refund on account of the decreased price of the commodity to Mississippi which it, in turn, sold to petitioners for consumption. Inquiry was made of peti-

tioners at the Bar and they conceded the lack of such contractual provision. Regardless of whether the Court determined that Mississippi was *prima facie* entitled to the fund, we submit that it is obvious that having a contract for the sale of the commodity at a set price resulting from arms-length bargaining, any equitable interest which petitioners had would have to be positively shown at the hearing. Mississippi certainly carried its burden of showing its equities in the premises when it was demonstrated that had no Stay Order ever been issued in this case it would have been entitled to keep all excess charges paid to Interstate for gas which Mississippi then sold directly for consumption.[3] So, whatever the Court below may have stated,

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[3] The total excess charges paid by Mississippi amounted to $1,484,582.53 (R. 91). Of this the following division can be made:

	Applicable to Regulable Sales	Applicable to Direct Sales	Total
June 1, 1943 to January 20, 1946	$300,898.66	$575,281.75	$ 876,180.41
January 21, 1946 to September 30, 1947	244,103.70	364,298.42	608,402.12
Total	$545,002.36	$939,580.17	$1,484,582.53

(R. 92). The Federal Power Commission entered a rate order against Mississippi effective January 20, 1946. Mississippi already passed on at the time this refund controversy arose the amount of $244,103.70 or the amount attributed to excess charges during that portion of the impoundment period in which Mississippi was subject to the Commission's rate reduction order. The amount of $300,898.66 was that amount in excess charges on the quantities of gas sold for resale prior to such rate order against Mississippi (R. 12-14, 92-93). Had no stay been entered in the case of Interstate, Mississippi would have been allowed to keep this $300,898.66 since the Federal Power Commission has no authority to award reparations (*Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 618). Mississippi agreed however to pass this amount on for the benefit of ultimate resale consumers. The total amount applicable to direct sales for consumption ($939,580.17) is an amount which Mississippi actually lost since it had to pay to Interstate the excess charges for the volume of gas which it sold for direct industrial consumption whereas had the stay not been granted it would have been able to purchase gas from Interstate at the reduced rates but could continue to sell for direct industrial usage at the contract rates (R. 13-14).

Mississippi assumed the burden of going forward with the evidence and placed the matter in such a situation that any countervailing equities would have had to have been shown positively. Even at this late date petitioners are unable to assert one single equitable fact entitling them to any share in the excess charges. All of their contentions upon examination collapse completely. Petitioners plaintively speak of the rules laid down by the Court below which they assert "made it practically impossible for it to find for anyone but Mississippi". An examination of the record in this case shows that it was not any rule laid down by the Court, but the evidence and applicable principles which made it impossible for the Court below to find for anyone but Mississippi. The Court laid down no rules. It afforded of petitioners the widest latitude of making contentions and adducing evidence. As the Court pointed out:

> "all parties were advised that they would be at liberty to file amendments at any time before the filing date set for their briefs if they were, or became, advised that their present pleadings did not suffice."

And also:

> "At the same time and in the same way inquiry was made as to whether there were any controverted issues of fact, particularly as to whether there was any dispute with reference to the amounts • • • whether any of the contracts contained provisions for price relief or reduction • • •
>
> "the parties were advised that if before the coming in of the briefs they should be of a different opinion and should desire to file affidavits or agreed statements as to facts, they could do so" (R. 133-134).

In the face of this, what rules were laid down by the Court of Appeals which prejudiced anyone in a full showing of

any facts or principles? In fact this was not a trial at *Nisi Prius* where there were great and controverted issues of fact. The proceeding largely revolved around questions of law or conclusions to be drawn from undisputed underlying facts (R. 134). In such an instance, an asserted *"prima facie"* right certainly does not mean a presumptive right or an absolute right. The Court merely was of the opinion that the monies presently in dispute being beyond the pale of the Federal regulatory process belonged to Mississippi "unless superior claims to it in law or in equity are shown" (R. 136). Since no right in law or no right in equity was shown or can be shown by these petitioners, the use of the words *"prima facie"* is of no moment.

Petitioners then concerned themselves with the language of this Court in treating of the general refund matter before it in respect of whether reductions would reach industrial users "either by terms of the contracts or by virtue of the assertion of regulatory authority" (336 U. S. at 583). Petitioners have their greatest problem at this point. They assert that regardless of the state of the Illinois law, this Court had determined that Mississippi could not share in any of the excess charges. This certainly was not the conclusion of this Court. This Court was dealing with the second part of its Opinion at this point and was there concerning itself with what ultimately would happen to the refund and was directing its attention specifically to the sphere of sales not covered by the Natural Gas Act but where the states may act. Immediately after the statement of this Court as to what would happen in the case of industrial users, it is stated:

> "If in this situation local law provides a standard for determining which of two or more claimants would have been entitled to the benefits of the rate reduction, the Federal courts should apply it" (336 U. S. at 583).

In conformity with the subsequent portion of this Court's Opinion, the Court relied upon available sources of local law and in strict conformity with the final admonition of this Court it prognosticated what would have happened had no Stay ever been granted, by a proper excursion into all applicable law. The Court below was able to determine with far greater certainty than this Court could have expected exactly what would have happened in regard to the excess charges for gas sold by Mississippi for consumption. Armed as it was with definitive pronouncements of the regulatory agencies of the only two states involved, the Court was able to determine that during the whole of the impoundment period beyond peradventure of doubt no industrial customer could have claimed of Mississippi any reparative or other relief and being without contractual right to do so the benefits of a decreased cost for a commodity inured to the benefit of Mississippi the same as to any other seller in a free market (R. 139-140).

Petitioners confound their confusion by stating that if they as direct industrial purchasers of gas are not entitled to the protection of the Natural Gas Act, the same would be true of sales to industrial customers by local distributors. This, of course, in view of the determination of this Court in *Panhandle Eastern Pipe Line Company* v. *Public Service Commission of Indiana* (332 U. S. 507) is ridiculous. The authority of the Power Commission over natural-gas companies is extensive but its authority over sales of natural gas by such companies is limited.

Again, pursuing their phantom equitable doctrines, petitioners make the same mistake made by the Illinois Commerce Commission, petitioner in No. 360 of this Term, when they assert as a fact that the payment of excess charges to Mississippi will keep them within a family—

asserting corporate affiliation between Interstate and Mississippi. One could almost accuse petitioners of purposeful misrepresentation in making this assertion because they know for a fact that such affiliation no longer exists.

Further pursuing the equitable aspects, petitioners attempt to maneuver Mississippi out of its rightful lot by alleging that the Court ignored the fact that Mississippi has a monopoly in the St. Louis area. It indicates that this would militate against a finding of arms-length bargaining found to be a fact by the Court below. As indicated by the Court below, Mississippi so far as its industrial sales for consumption are concerned sells gas in competition with other fuels (R. 138).[4]

Indicative of the false foundation upon which petitioners have built their whole assertion of equitable right to any part of the fund is indicated when it states that it has a greater right to the excess charges of gas used for consumption than Mississippi because Mississippi being a regulated monopoly company has a lesser equity than they. They conclude:

> "certainly no such consideration has prevented refunds to business customers of distributing utilities" (petition, p. 14).

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[4] There can be no doubt as to the correctness of this conclusion of the Court below. The Federal Power Commission has impliedly recognized it with particular reference to Mississippi (*In Re Mississippi River Fuel Corporation*, 5 F. P. C. 206, 213). The general competitive nature of natural gas with other available fuels for industrial purposes has also been authoritatively recognized (see Report of Federal Power Commissioners Smith and Wimberly to the Congress, "Natural Gas Investigation" (Docket No. G-580), pp. 336-337, 339, 340-341, 344). The Illinois Commerce Commission has also found that this competitive situation exists (see *Re Peoples Gas Light and Coke Company*, Case No. 37859, August 16, 1950, 85 PUR NS 33, 42), and stated: "Therefore, the rates for these classes of service [referring to industrials] should not be higher than the comparative costs of alternative fuels."

The facts of this case are that no industrial or business customer of any distributing utility purchaser of Mississippi in Illinois will get one cent of the excess charges of gas sold for resale. All distribution under the Decree of the Court is to be made to distributing companies and by them passed on only to their domestic consumers (R. 144-145).

Petitioners claim that the Court below failed to give effect to Illinois law. Essentially, petitioners complain that the Court below should have attended more to an as yet undetermined show cause order premised solely upon unilateral investigation and not seasonable here than to a definitive order of a year before holding Mississippi was not subject to the Illinois Public Utility Law. In the alternative, petitioners claim the Court below should have made its own investigation of and conclusion as to the Illinois law. We submit that the Court below made the logical choice, i.e., choosing a definitive order applicable to the period material here, over a mere initial pleading showing no new facts. The definitive seasonable order of the expert Illinois Commission based upon thorough consideration of probed facts of operation and law is certainly more persuasive than a unilateral attempt at a second guess. Upon this basis the Court below made an actual finding as to the Illinois law when it stated:

> "In these circumstances, it is quite clear that we cannot find that 'clear and speedy state remedies are available' to the industrial customers for the recovery of any of these funds but that the contrary is so. It is equally clear that proceeding 'in the interest of dispatch, to determine the questions, relying on such sources of local law as may be available, including information from state regulatory agencies', we must determine that these contestants are not entitled under local regulatory law to the refunds they claim" (R. 140).

Nor did this conclusion of the Court as to the state of the law or the availability of remedies to Illinois direct industrial consumers arise solely from the fact of the definitive order finding no jurisdiction. The Court relied also upon the Illinois statute both as to the right to regulate Mississippi's direct consumptive sales and as to any right to reparations on account of these excess charges (R. 139-140, and fn. 10).

In any event, the Statute is not as clear as petitioners would indicate (petition, p. 14) since petitioners omit from the body of their petition the fact that the Illinois law is applicable only to property used for the conveyance of oil and gas by pipe line if for "public use" (Smith-Hurd, Ill. Stats. Ch. 111⅔, §10(a); petition, p. 19). It was the finding of nonpublic use by Mississippi which occasioned the definitive finding of no jurisdiction (R. 34).

In any event, the conclusion of the Court below is peculiarly appropriate in the light of a subsequent order of the Illinois Commission which indicates a willingness upon the part of that regulatory body to allow a public utility to increase industrial rates even in the face of a possible overall excess rate situation (*Re Peoples Gas Light and Coke Company,* 85 PUR NS 337 (Ill. Com. Comn., Case No. 37859, August 16, 1950)). So, even if all petitioners say were true the Court below came to a correct conclusion as to probably what would happen in Illinois so far as the equities of the industrial consumers are concerned even today. Of course, since the Court had to reconstruct the probability had no Stay been granted, the definitive Order of 1949 concluding that there was no jurisdiction in the Illinois Commission would be conclusive of all of petitoners' claims here (R. 28-35). Also, the right to any reparations under the Illinois procedure would be gone

completely (Smith-Hurd, Ill. Stats. Ch. 111⅔, §76, petition, p. 20).

On the merits, therefore, the claim of petitioners that the Court below failed to carry out the mandate of the Court and that it failed to apply equitable principles and the Illinois law are without any foundation whatsoever.

II.

There is no question remaining under the Natural Gas Act or otherwise upon which this Court has not passed.

Petitioners, being direct consumers of gas sold by Mississippi, cannot assert any claims or rights under the Natural Gas Act since that Act's coverage as it relates to sales is limited to "sales for resale". As pointed out previously, no question on such sales is involved here and the confusion injected by petitioners arises solely from an attempt by them to identify themselves with utility distribution companies to which Mississippi sells gas for resale.

All other questions involved have already been passed on by this Court both in the previous appeal on the general refund situation (336 U. S. 577) which is the law of the case and also in *Central States Electric Company* v. *City of Muscatine, et al.* (324 U. S. 138), as construed by this Court under the law of this case. The Court below, being concerned only with the rights of direct consumers of gas sold by Mississippi, had the simple problem of determining their rights under local law as required by this Court. This the Court below did. There is no question remaining requiring a further review by this Court. Stripped to the bare essentials, this case involves only the question of the

rights which petitioners had under the law of the case and since such law has been strictly and fairly applied, no further question remains.

Conclusion.

For the reasons stated herein, the Petition for Certiorari should be denied.

Respectfully submitted,

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